No. 05-783

In The
# Supreme Court of the United States

ERIC RED,

*Petitioner,*

vs.

NILDA ROOS; WILLA BAUM,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In a non-jury proceeding, a bankruptcy judge ruled that respondents' wrongful death claims against petitioner were debts "for willful and malicious injury" and were thus not dischargeable in petitioner's bankruptcy (11 U.S.C. § 523(a)(6) (2000)). Then, in a state court trial of those wrongful death claims, the trial court ruled that petitioner could not have a jury trial on the issue of his liability to respondents because of the collateral estoppel effect of the bankruptcy judge's ruling.

28 U.S.C. § 1411(a) provides that bankruptcy law "do[es] not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." Was § 1411(a) violated by giving collateral estoppel effect to an order from a non-jury bankruptcy court proceeding so as to prevent a jury trial of the wrongful death claims?

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## PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND DISTRICT, DIVISION SEVEN

Petitioner Eric Red respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Second District, Division Seven, entered in this case on June 28, 2005.

Respondents Nilda Roos and Willa Baum sued petitioner Eric Red in this case for the wrongful death of respondents' adult sons, who were killed when petitioner's car crashed into a bar. Before the action was tried, petitioner filed for bankruptcy to discharge his debts. Respondents objected in the bankruptcy court to the discharge of their wrongful death claims.

"The facts surrounding the collision were hotly contested," respondents alleging that petitioner acted willfully and petitioner asserting that he was not responsible at all because he had suddenly lapsed into unconsciousness just before the accident. *In re Red*, No. 03-50642, 2004 WL 938481, at **1 (5th Cir. May 3, 2004). Following a one-day, non-jury proceeding, the bankruptcy court found for respondents, ruling that petitioner's debts to respondents were not dischargeable because they had been caused by "willful and malicious injury." *See* 11 U.S.C. § 523(a)(6).

After making its nondischargeability order, the bankruptcy court stated that petitioner "will now have an opportunity to convince a jury in the state of California that he was right, and obviously if he does, then that pretty much makes my decision a moot issue." Respondent Roos's lawyer similarly commented that petitioner "will be provided in [the state court action] an opportunity to present evidence in his defense. . . . Due process will be

served, and the Debtor [petitioner] will have his day in court."

The promised "opportunit[ies]" never materialized, however. Instead, the state court granted respondents' motion to preclude petitioner from contesting his liability before a jury, ruling that the bankruptcy court's nondischargeability order collaterally estopped petitioner. With liability thus established by collateral estoppel, the case proceeded to a damages-only trial that resulted in a judgment totaling over $1,000,000.

Petitioner appealed. The state Court of Appeal affirmed in a published opinion and the state Supreme Court denied discretionary review.

The lower courts' decisions precluding petitioner from contesting his liability to respondents in this case – and from having a jury trial on liability in any forum – present "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

A federal statute provides that bankruptcy law "do[es] not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." 28 U.S.C. § 1411(a). This Court has called the statute "notoriously ambiguous" and said it has a "confused legislative history," *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40 n.3 (1989), and no reported case before the state Court of Appeal's opinion here has analyzed whether the statute prevents giving collateral estoppel effect to an order from a non-jury bankruptcy proceeding so as to deny a jury trial. The need for high court guidance is clear.

The statutory construction issue is not only a compelling one, but it is also one that the Court of Appeal got wrong. The Court of Appeal said that construing the statute to prohibit giving collateral estoppel effect to the bankruptcy court ruling "at first glance . . . appears to follow logically from the language of the statute . . . ," but it then rejected that interpretation. However, that is the only interpretation that gives the statute meaning.

Under the statute, the limited nondischargeability proceeding – where there was no right to a jury trial and in which the bankruptcy court did not even have jurisdiction to decide the validity of respondents' wrongful death claims – could not preempt petitioner's right to a jury trial on his liability. Giving the bankruptcy court ruling collateral estoppel effect allows bankruptcy law to "affect" – indeed, to deny altogether – petitioner's right to a jury trial regarding wrongful death claims, which the statute prohibits.

## OPINIONS AND ORDERS BELOW

The judgment of the California Superior Court for the County of Los Angeles and that court's order granting respondents' motion to give collateral estoppel effect to a bankruptcy court order are not published, but they are reproduced in the appendix [hereafter App.], App. 26, 29.

The California Court of Appeal's opinion affirming the judgment is published. *Roos v. Red*, 130 Cal. App. 4th 870, 30 Cal. Rptr. 3d 446 (Ct. App. 2005). It is reproduced at App. 14.

The California Supreme Court's order denying discretionary review is not published, but it is reproduced at App. 47.

## JURISDICTION

The California Court of Appeal filed its opinion on June 28, 2005. The California Supreme Court denied discretionary review on September 21, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a) (2000).

## STATUTORY PROVISION INVOLVED

28 U.S.C. § 1411 provides:

> (a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.
>
> (b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.

## STATEMENT OF THE CASE

On May 31, 2000, petitioner Eric Red's car crashed into a Santa Monica, California bar, killing two patrons –

the adult sons of respondents Nilda Roos and Willa Baum – and injuring many others. (1 CT 60; 2 CT 264.)[1]

The parties agree on that much. The cause of the accident, however, is and has been – as accurately stated by the Fifth Circuit Court of Appeals in a related matter – "hotly contested." *In re Red*, No. 03-50642, 2004 WL 938481, at **1 (5th Cir. May 3, 2004).

Petitioner was at the wheel of his car at the time of the tragedy, but he asserts that just before the incident, he had unexpectedly succumbed to syncope, a medical condition which caused him to lose consciousness.[2] (*See* 1 CT 61, 63-64; 2 CT 264.) Respondents, on the other hand, contend that petitioner was alert and that he acted willfully, and they attribute his conduct to his "depressed mental state caused by distress over personal and financial problems." *In re Red*, 2004 WL 938481, at **1.

Respondents sued petitioner for wrongful death in California state court. (1 CT 13, 29.) Petitioner then filed for bankruptcy protection in the United States Bankruptcy Court. (1 CT 51.) Petitioner sought a discharge of his debts, i.e., an "involuntary release" by operation of law of

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[1] References to "CT" and "RT" are to the clerk's transcript and reporter's transcript which comprised the appellate record before the California Court of Appeal.

As will be explained, the parties presented no evidence in this case about the accident, but did present some evidence in a bankruptcy court proceeding. Descriptions of the accident here come from federal court opinions concerning the bankruptcy proceeding.

[2] Syncope is "[a] fainting or swooning; a sudden fall of blood pressure or failure of the cardiac systole, resulting in cerebral anemia and subsequent loss of consciousness." Stedman's Medical Dictionary 1521 (25th ed. 1990).

creditors' claims *In re Dow Corning Corp.*, 255 B.R. 445, 476 (E.D. Mich. 2000).[3] The bankruptcy petition filing stayed the California wrongful death action. (1 CT 47, 53.)

Respondents asked the bankruptcy court to lift the stay so that they could proceed with their state court action. (2 CT 335.) When petitioner objected (2 CT 340) and the bankruptcy court refused, respondents filed complaints in the bankruptcy proceeding (2 CT 341, 358). The complaints asked that respondents' wrongful death claims against petitioner not be discharged in bankruptcy. (2 CT 343, 361-362.) They asserted that the claims were debts "for willful and malicious injury by the debtor," which are not dischargeable. 11 U.S.C. § 523(a)(6).

In a non-jury trial, the bankruptcy court heard one day of evidence and then ruled for respondents. (1 CT 77.) The court concluded that the accident happened this way:

> "Mr. Red was conscious and alert and intentionally jammed his foot onto the accelerator pushing the car in front of him out of the way, . . . his car then slipped off the car in front of him after it was well into the intersection, veered to the left, crashed through the front doors of the billiard pub at a speed approaching 35 mph, crashed into the bar where it stopped after it had killed two people – and . . . all of this occurred because of a fit of uncontrollable rage on the part of Mr. Red, the reason for the rage being largely unknown."

(App. 44; 1 CT 75-76.)

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[3] This Court "on numerous occasions has stated that '[o]ne of the primary purposes of the Bankruptcy Act' is to give debtors 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.'" *Perez v. Campbell*, 402 U.S. 637, 648 (1971).

The federal district court affirmed the bankruptcy court's order (2 CT 263) and the Fifth Circuit Court of Appeals affirmed the district court's decision (*In re Red*, 2004 WL 938481). After appealing the bankruptcy court's order to the district court, petitioner moved the bankruptcy court for a stay pending the federal appeal. (1 CT 110, 178.) The court denied the motion. (1 CT 193.)

During the hearing on the stay motion, the bankruptcy judge made clear that one of the reasons he was denying a stay was because he expected petitioner would have a jury trial in California that might lead to a result in conflict with his finding of "willful and malicious injury." The bankruptcy judge ruled that the denial of a stay would not harm petitioner because "all [that] these parties are going to do is go to trial" and petitioner "will now have an opportunity to convince a jury in the state of California that he was right, and obviously if he does, then that pretty much makes my decision a moot issue." (1 CT 193.)

Respondent Roos's own counsel made similar statements. In addressing the issue of whether petitioner would be harmed by the absence of a stay, counsel said that, "if [petitioner] has to proceed in the state court action, he will be provided in that setting an opportunity to present evidence in his defense. In fact, the net result of the [bankruptcy] court's order is merely to state what action may continue. Due process will be served, and the Debtor [petitioner] will have his day in court." (1 CT 188.)

While petitioner's bankruptcy appeals proceeded in the federal district court and then in the Court of Appeals, activity in the state court case resumed. (*See* 2 CT 223.) However, instead of giving petitioner "an opportunity to convince a jury in the state of California that he was right"

and "an opportunity to present evidence in his defense," and instead of petitioner "hav[ing] his day in court," respondents successfully moved in the trial court to prevent petitioner from contesting liability.

Respondents filed a motion in limine to preclude petitioner from presenting evidence on the issue of his liability because, respondents asserted, the bankruptcy court order denying discharge of respondents' claims was binding on that issue in the trial court under collateral estoppel principles. (2 CT 288, 290, 300, 354, 356.) Petitioner opposed the motion, contending he was entitled to a jury trial on liability. (2 CT 367; 3 CT 526.)

The trial court granted respondents' motion, ruling that the bankruptcy court order collaterally estopped petitioner from disputing liability before a jury. (App. 29; 3 CT 584; 1 RT A-17.) Because of the court's collateral estoppel ruling, the case went to jury trial on the issue of damages only, the court instructing the jury that petitioner's "responsibility for [respondents'] claimed harm is not an issue for you to decide." (3 CT 599; 2 RT 165-166.)

The jury awarded respondent Roos $512,328.69 and awarded respondent Baum $500,000. (3 CT 607-608; 2 RT 177-178.) The court entered judgment for those amounts. (App. 26-27; 3 CT 610-612.) Petitioner appealed. (3 CT 656.)

On appeal, petitioner argued that giving collateral estoppel effect to the bankruptcy court's decision violated 28 U.S.C. § 1411(a). (Appellant's Opening Brief 3, 11-15; Reply Brief 1, 2, 4-8.)[4] The Court of Appeal rejected the

[4] The heading for petitioner's argument on the issue in his opening brief was: "The trial court erred in giving the bankruptcy court order

(Continued on following page)

argument, even though it stated that petitioner's position "at first glance . . . appears to follow logically from the language of the statute. . . ." (App. 15.)

The court concluded that § 1411(a) "preserves the right to a jury trial in a wrongful death action *only* to the extent that the right to a jury trial existed under the applicable non-bankruptcy law (i.e., under the Constitution or relevant statute). And . . . the Federal and California state constitutional jury trial guarantees give way to the application of collateral estoppel." (App. 19 (original emphasis) (footnotes omitted).) It also said that "nothing in the case law, legislative history or statutory scheme indicates that section 1411 operates to supplant the well-established doctrine of collateral estoppel." (App. 19.)

The Court of Appeal denied petitioner's rehearing petition. (App. 46.) Petitioner then sought discretionary review in the California Supreme Court, but that court denied review. (App. 47.)

collateral estoppel effect when a federal court would not have done so because of a federal statute that prevents bankruptcy law from 'affect[ing] any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a . . . wrongful death tort claim.'" (Appellant's Opening Brief 11.)

## REASONS FOR GRANTING CERTIORARI

### THIS COURT SHOULD DECIDE WHETHER 28 U.S.C. § 1411(a) PROTECTS AGAINST A BANKRUPTCY COURT ORDER BEING GIVEN COLLATERAL ESTOPPEL EFFECT TO DENY A JURY TRIAL IN A PERSONAL INJURY OR WRONGFUL DEATH CASE.

### A. Interpretation is needed of what this Court has called a "notoriously ambiguous" statute with a "confused legislative history."

28 U.S.C. § 1411(a) provides that the federal bankruptcy laws "do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." In this wrongful death action, however, the trial court and Court of Appeal ruled that a bankruptcy court order in a non-jury dischargeability proceeding collaterally estopped petitioner from contesting his liability before a jury.

This case presents the issue whether § 1411(a) protects against giving collateral estoppel effect to a bankruptcy court order to deny petitioner a jury trial. Although the question arose in California state court, it was decided as a matter of federal law. In California, when a federal court order or judgment is the basis for a collateral estoppel claim, "[s]uch an order or judgment has the same effect in the courts of this state as it would have in a federal court." *Levy v. Cohen*, 561 P.2d 252, 257, 137 Cal. Rptr. 162 (1977).

If there ever were a statute in need of this Court's clarification, § 1411 is it. In *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), the Court said that § 1411 is "notoriously ambiguous" and has a "confused legislative

history." *Id.* at 40 n.3; *see also id.* at 60 ("Whether [section] 1411 . . . purports to abolish jury trial rights in what were formerly plenary actions is unclear."). The construction of § 1411 was not before the Court in *Granfinanciera*,[5] but the meaning of that statute is squarely raised here.

The Court should use this case to interpret § 1411. And, as now explained, in doing so it should reverse the state Court of Appeal's judgment.

### B. The California Court of Appeal's interpretation of the statute is incorrect and gives a misleading view of the statute's legislative history.

#### 1. The court's interpretation makes § 1411 meaningless.

The California Court of Appeal concluded that the bankruptcy court's finding precluded petitioner from challenging before a jury his liability on respondents' wrongful death claims. The bankruptcy court itself, however, clearly thought otherwise. After it made its ruling, the court stated that petitioner "will now have an opportunity to convince a jury in the state of California that he was right, and obviously if he does, then that pretty much makes my decision a moot issue." (1 CT 193.) The appellate court's holding contradicts not only the bankruptcy court's expectations, but the terms of § 1411 as well.

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[5] The *Granfinanciera* Court held that a person sued by a bankruptcy trustee for an alleged fraudulent transfer has a right to a jury trial under the Seventh Amendment and also concluded that § 1411 did not apply because the relevant bankruptcy petition was already pending when the statute was enacted. *Id.* at 40 n.3.

The Court of Appeal acknowledged that interpreting § 1411(a) as prohibiting the bankruptcy court order from being used preclusively to deny petitioner a jury trial on his liability for wrongful death "at first glance . . . appears to follow logically from the language of the statute. . . ." (App. 15.) It then rejected that interpretation, however, concluding that the trial court could give collateral estoppel effect to the order. The "first glance" is the correct way to view the statute. The opinion's alternative interpretation contravenes basic rules of statutory construction.

A key assumption courts make when they interpret statutes is that legislative enactments are intended to do something. *See, e.g., Int'l Ass'n of Machinists, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Group*, 387 F.3d 1046, 1057 (9th Cir. 2004) ("[W]e must presume that, '[a]bsent clear congressional intent to the contrary, . . . the legislature did not intend to pass vain or meaningless legislation. . . .'"); *Astoria Federal Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 111-112 (1991).

The Court of Appeal stated what it believed § 1411(a) does *not* do – according to its opinion, the statute does not "preclude[ ] a state court presiding over a wrongful death action from giving preclusive effect to bankruptcy findings. . . ." (App. 20.) Conspicuously absent from the opinion, however, was any indication of what § 1411 *does* do. And, indeed, under the opinion's interpretation, it is difficult to imagine what effect the statute could ever have.

Section 1411(a) provides that bankruptcy law "do[es] not affect any right to trial by jury that an individual has

under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim."[6] But, the collateral estoppel or res judicata effect of one of its orders is the only way that a bankruptcy court can "affect" an individual's right to a jury trial regarding a personal injury or wrongful death claim.

The Court of Appeal correctly pointed out that statutes other than § 1411 already preclude a bankruptcy court from liquidating personal injury or wrongful death claims and from conducting trials on such claims and that there is no right to a jury trial in a bankruptcy dischargeability proceeding. (App. 18 n.15, 19-20.)[7] Given that law, the only remaining threat a bankruptcy proceeding poses to an individual's jury trial right regarding a personal injury or wrongful death claim is that, as here, a bankruptcy court's findings will be given preclusive effect in a

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[6] It is clear that there is a right to a jury trial under "nonbankruptcy law" in a personal injury or wrongful death case. *Deward v. Clough*, 54 Cal. Rptr. 68, 72 (Ct. App. 1966) (right to trial by jury in car accident case under both federal and California constitutions); *see Ross v. Bernard*, 396 U.S. 531, 533 (1970) (federal constitutional right to jury trial "unmistakabl[e]" in "actions for damages to a person").

[7] A proceeding, like the one in the bankruptcy court here – to "determin[e] . . . the dischargeability of particular debts" (28 U.S.C. § 157(b)(2)(I) (2000); *see* 1 CT 60 (bankruptcy court stating the determination of rspondents' complaints were proceedings under 28 U.S.C. § 157(b)(2)(I))) – is a limited proceeding that is separate from determinations whether debts are valid and, if so, their value. When personal injury plaintiffs ask a bankruptcy court to find a debt nondischargeable, they are "seek[ing] to resolve only the limited issue of whether their claim is dischargeable in the debtor's bankruptcy. This issue 'is separate and distinct' from the plaintiffs' claim for liquidation and allowance against the bankruptcy estate." *In re Frederick*, 133 B.R. 1008, 1010 (Bankr. S.D. Ind. 1991); *see also In re Santos*, 304 B.R. 639, 647 (Bankr. D.N.J. 2004) ("the trial of a 'personal injury tort claim' . . . [is] beyond the subject matter jurisdiction of this court.").

subsequent action in which the person would otherwise have a right to make his case before a jury. If § 1411 does not protect against that threat, it does nothing.

The Court of Appeal opinion used circular reasoning. Although the statute prevents a bankruptcy court from "affect[ing]" an individual's right to jury trial, the opinion said that the statute is not violated because there is no right to a jury trial on a factual issue that has already been determined by a bankruptcy court. But, under the opinion's reasoning, it is the bankruptcy court that is eliminating the jury trial right by making the factual determination, which is precisely what § 1411 says a bankruptcy determination cannot do. Here, for example, prior to the bankruptcy court's ruling, petitioner undoubtedly had a right to a jury trial in the state court wrongful death litigation, but, according to the court's opinion, he did not have a right to a jury trial after and because of the bankruptcy court ruling.

The opinion stated that § 1411 was "not intend[ed] to expand or create a new source of jury trial rights." (App. 17.) But petitioner's interpretation does not expand or create a new source of jury trial rights. The statute does not give a right to jury trial in any *type of lawsuit* in which a person otherwise would not have that right. Thus, § 1411 does not, for example, create a jury trial right in dischargeability or other equitable proceedings. To have any effect, however, the statute must protect against *means* by which an existing jury trial right can be divested, such as by giving collateral estoppel effect to a bankruptcy court order in a state wrongful death action.

Logically, semantically, and for § 1411 to have any meaning, this must be considered a situation where

bankruptcy law is "affect[ing] a[] right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a . . . wrongful death tort claim" § 1411(a). Under any reasonable definition of the word, the bankruptcy court "affect[ed]" petitioner's jury trial right.

**2. The opinion's conclusion that "section 1411(a) was designed with the protection and interests of tort claimants/creditors rights, rather than debtors, in mind" omits pertinent legislative history and is contrary to the statute's terms.**

The Court of Appeal also concluded that "section 1411 was designed with the protection and interests of tort claimants/creditors rights, rather than debtors, in mind." (App. 18.) That view is contrary to § 1411(a)'s language and to pertinent portions of the statute's legislative history which the court's opinion avoided.

The statute's language does not limit its protections to claimants and creditors, but rather provides broadly a safeguard for jury trial rights "that an *individual* has." § 1411(a) (emphasis added). Of course, substituting "claimant" or "creditor" for the more inclusive "individual" that Congress used violates another fundamental principle of statutory construction. *See 62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951) ("[O]ur problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain – neither to add nor to subtract, neither to delete nor to distort.").

The opinion's discussion of § 1411(a)'s legislative history on this point is misleading. It relies on a remark by

Senator Heflin to bolster its conclusion that the statute was designed to protect tort claimants rather than debtors. The opinion said, "According to Senator Heflin: 'Congress never intended that the filing of a bankruptcy petition by a debtor act as an escape hatch from jury trials.'" (App. 18.)

The opinion did not mention, however, that, in the very next sentence after the one the opinion quotes, Senator Heflin indicated an intent to protect the jury trial rights of *debtors* along with those of everyone else. Senator Heflin said, "Thus, where a *debtor*, creditor or noncreditor third party would have had a right to a jury trial on an issue of fact pursuant to Federal or State law absent application of the bankruptcy laws, this amendment ensures that such rights remain intact." 30 Cong. Rec. 17152 (1984) (remarks of Sen. Heflin) (emphasis added). What's worse, in an earlier part of the opinion, the court did quote that second sentence, but used an ellipsis to eliminate the words "debtor, creditor or noncreditor third." (App. 17.)[8]

The opinion relied on other faulty authority for its conclusion that Congress did not intend to protect *everyone's* jury trial rights in § 1411. It cited a bankruptcy judge's decision to support the conclusion that the impetus for § 1411(a) was "the strong lobbying efforts of the personal

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[8] Another legislator made a similar comment suggesting a lack of intent to limit section 1411(a)'s protections to creditors. 30 Cong. Rec. 20228 (1984) (remarks of Rep. Kastenmeier) ("[T]he conference report states that in this narrow range of cases [i.e., personal injury and wrongful death] the *parties* do not lose any right to a jury trial that they may have had if the claim had been cognizable outside the bankruptcy context." (emphasis added)).

injury tort bar." (App. 17 (citing *In re Ice Cream Liquidation, Inc.*, 281 B.R. 154, 161 (Bankr. D. Conn. 2002)).) But, that judge's decision relied on only another bankruptcy judge's decision, *In re Dow Corning Corporation*, 215 B.R. 346, 353-354 (Bankr. E.D. Mich. 1997), and that other judge's decision – which was filed over a decade after § 1411(a)'s enactment – relied on nothing at all. That is hardly reputable legislative history.

The fact that petitioner's interpretation of § 1411 "at first glance . . . appears to follow logically from the language of the statute . . . " (App. 15) is a strong indication of the interpretation's correctness. After all, "'[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Engine Mfgs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004).

## CONCLUSION

For the reasons stated, this Court should grant certiorari.

Respectfully submitted,

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# APPENDIX

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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|---|---|
| NILDA ROOS, et al.,<br>Plaintiffs and Respondents,<br>v.<br>ERIC RED,<br>Defendant and Appellant. | B173506<br>(Los Angeles County Super. Ct. No. SC066841) |

[FILED JUN 28, 2005]

APPEAL from a judgment of the Superior Court of Los Angeles County. Lorna Parnell, Judge. Affirmed.

Brandon Baum and Carlos A. Lloreda, Jr. for Plaintiffs and Respondents.

Horvitz & Levy, David M. Axelrad and David S. Ettinger; Doherty & Catlow and John Doherty for Defendant and Appellant.

Eric Red appeals from a judgment entered upon a verdict in favor of respondents, Nilda Roos and Wilma Baum, on their respective complaints against Red for wrongful death. Before trial respondents filed a motion in limine requesting the court apply the doctrine of collateral estoppel to factual findings made by the federal bankruptcy court in a discharge proceeding involving the parties. The bankruptcy court specifically found respondents' wrongful death claims were not discharged by Red's

petition for bankruptcy because the claims were the result of Red's willful and malicious conduct. The trial court here granted the motion in limine, and thus, precluded Red from contesting the issue of liability on the wrongful death claims in front of the jury. On appeal Red claims the trial court erred in giving the bankruptcy court's findings collateral estoppel effect because doing so: (1) violated a federal bankruptcy statute (28 U.S.C., § 1411), which preserved his right to a jury trial on wrongful death claims; and (2) did not comport with fairness and sound public policy. We disagree. Red has not convinced us 28 United States Code section 1411 precludes the application of the well-established doctrine of collateral estoppel in this context or that the application of the doctrine was unfair or unsound. Consequently, we affirm.

## *FACTUAL AND PROCEDURAL HISTORY*

**Wrongful Death Claims**. At about 6:00 p.m. on May 31, 2000, Red was driving his SUV and struck another vehicle stopped at a red light on Wilshire Boulevard in Santa Monica.[1] After pushing the car in front of his into the intersection, Red's SUV crossed opposing lanes of traffic, veered off the road and crashed through the front doors of a billiard's pub. The SUV came to a stop when it hit the bar inside the pub. Two patrons of the pub, the adult sons of respondents Nilda Roos and Willa Baum, died as a result of the collision. Immediately after the collision, Red picked up a piece of broken glass and attempted to cut his throat.

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[1] The facts concerning the collision are taken from the memorandum opinion of the bankruptcy court.

In June 2000, respondent Roos filed a wrongful death action against Red. Respondent Baum filed her claim in May 2001 and both actions were consolidated in July 2001.

In October 2001, Red, who had briefly relocated to Texas,[2] filed for bankruptcy protection in the United States Bankruptcy Court in the Western District of Texas. Red sought to discharge all of his debts (including the claims filed in the tort actions stemming from the collision) by operation of law. Red also sought and received a stay of the state court wrongful death actions. Respondents appeared in the bankruptcy proceedings and asked the bankruptcy court to lift the stay so that the wrongful death actions could proceed in the California state court. Red opposed the request arguing to the bankruptcy court:

> "[T]here will be a presentation of evidence apparently that this [bankruptcy] Court will be asked to weigh regarding whether there was any intent here . . . [¶] So it's on that basis, Your Honor, we – that we ask you to use the equitable discretion the Court has to deny the request for relief from stay. And if there is a petition filed to establish a non-dischargeable debt, let the facts be presented here, let this Court hear whether there's a basis for anything."

The bankruptcy court denied the respondents' request. In turn, respondents filed complaints in the bankruptcy proceedings to determine the dischargeability of their

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[2] Red "moved" to Texas shortly before he filed for bankruptcy, and within three months after filing for bankruptcy protection, returned to California. The bankruptcy court suspected Red's brief relocation to Texas was for the purpose of filing bankruptcy in a forum inconvenient to the plaintiffs in the state court action.

claims against Red and to object to the discharge. Specifically they alleged their claims were debts "for willful and malicious injury by the debtor" and were thus not subject to discharge in bankruptcy pursuant to 11 United States Code section 523, subdivision (a)(6).

The parties conducted discovery in preparation for a trial in the bankruptcy court on respondents' complaints.[3] In Red's pre-trial brief, among the issues he listed for the court's determination were whether: (1) the May 31, 2000, collision was the result of a voluntary and intentional act on Red's part; (2) Red intended to cause harm to the patrons of the pub; and (3) respondents had met their burden of proof and shown by a preponderance of the evidence Red acted willfully and maliciously in causing the collision.

In November 2002, the matter proceeded to a one-day bench trial in the bankruptcy court. During the trial evidence from percipient and expert witnesses was presented. Red introduced evidence from seven witnesses, offered 32 exhibits and testified on his own behalf.

The contest in the trial court centered on the cause of the collision. Red contended the collision was the result of his unintentional and involuntary acts. He claimed he suffered from an episode of syncope (i.e., a brief loss of consciousness caused by a temporary loss of oxygen to the brain) and therefore he was unconscious from the moment his SUV hit the car on Wilshire Boulevard until it came to rest inside the pub. He stated he had suffered from several prior incidents of loss of consciousness,

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[3] The parties took a total of eight depositions and exchanged written discovery.

though he admitted that he did not tell anyone about them at the time they occurred.

Respondents claimed the accident, which occurred on the one-year anniversary of Red's failed marriage, was the result of his depressed mental state caused by distress over his personal and financial problems. They also presented a medical expert witness who testified Red's behavior and circumstances surrounding the collision did not support a finding of syncope.

The parties presented inconsistent eyewitness testimony, some witnesses stated that they saw Red upright, awake and alert during the incident. Two witness supported Red's version, testifying Red's eyes were closed and that he was leaning towards the right. At the end of the presentation of evidence, the parties submitted written closing arguments to the court and the matter was taken under submission.

On February 4, 2003, the bankruptcy court issued its opinion. The court concluded respondents' claims were not discharged under 11 United States Code section 532, subdivision (a)(6). The court determined the collision was the result of Red's voluntary and intentional actions; Red intended to harm the patrons of the pub; and respondents had met their burden to prove that the injuries resulted from Red's intentional and malicious conduct. The bankruptcy court found Red's defense of loss of consciousness incredible and unproved. The bankruptcy court concluded: "Mr. Red was conscious and alert and intentionally jammed his foot onto the accelerator . . . crashed through the front doors of the billiards pub at a speed approaching 35 mph, [and] killed two people – and that all of this

occurred because of a fit of uncontrollable rage on the part of Mr. Red. . . . "

Red filed an appeal of the bankruptcy court's decision in the federal district court.[4] While the appeal was pending, Red filed a motion in the bankruptcy court requesting a stay pending the appeal. The court denied the stay. But during the hearing on the stay, the court made comments indicating a belief that the state court wrongful death action would proceed to trial and that Red would "have an opportunity to convince a jury in the state of California that he was right. . . ."[5]

In April 2003, this case was returned to the active calendar in the superior court. Prior to trial, respondents filed a motion in limine requesting the trial court give the bankruptcy court's findings in the dischargeability proceeding collateral estoppel effect in the wrongful death actions. Specifically they requested that in view of the bankruptcy court's conclusion Red had acted willfully and maliciously in causing the accident, Red should not be allowed to re-litigate his liability for the injuries.

Red opposed the motion arguing collateral estoppel should not apply because: (1) the issues in the bankruptcy proceeding were not identical to those at issue in the

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[4] The district court affirmed the bankruptcy court's decision. The Fifth Circuit Court of Appeals also affirmed and Red's request for en banc review was denied. (*In re Red* (5th Cir. 2004) 96 Fed.Appx. 229.)

[5] Respondent Roos' bankruptcy counsel make a similar comment: "If Red has to proceed in the state court action, he will be provided in that setting an opportunity to present evidence in his defense. [¶] In fact, the net result of the [bankruptcy] court's order is merely to state what action may continue. Due process will be served, and the Debtor [Red] will have his day in court."

wrongful death action; (2) the matter was not "fully and fairly" litigated in the bankruptcy court because respondents' medical expert was not qualified to give his opinion, the bankruptcy judge was biased against him, and Red had located a new witness who did not provide evidence in the bankruptcy trial; (3) he had no right to a jury trial in the bankruptcy trial and thus application of collateral estoppel would deprive him of his constitutional right to a jury trial; and (4) application of collateral estoppel would be unfair, contrary to public policy and would not further the purposes of the doctrine.

The trial court granted the motion in limine, ruling Red could not contest the issue of liability and ordered that the jury trial be limited to the issue of damages. After a brief trial,[6] the jury returned verdicts of $512,328.69 for respondent Roos and $500,000 for respondent Baum.

Red filed a motion for a new trial, requesting a new trial and stay pending the outcome of (then still pending) appeals of the bankruptcy court order in the federal court. The court denied the motion.

Red timely appealed from the underlying judgment.

## *DISCUSSION*

### I. Standard of Review

Among the several points of contention in this appeal is whether the standard of appellate review governing a decision to apply collateral estoppel is *de novo* or an abuse

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[6] Red indicated he would waive his right to a jury trial on damages. However, respondents requested the damage issue be heard by a jury.

of discretion. Some case law discusses the trial court's exercise of *discretion* in deciding to allow the "offensive" use of collateral estoppel. (E.g., *Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 942.) Such authority suggests the appellate court should give deference to the lower court's decision. The predominate view, however, is the trial court's application of collateral estoppel is reviewed *de novo*. (See *Groves v. Peterson* (2002) 100 Cal.App.4th 659, 667; *Campbell v. Scripps Bank* (2000) 74 Cal.App.4th 1328, 1333.) Here the facts determining whether the trial court properly applied collateral estoppel are uncontested, and thus application of the doctrine is a question of law to which we apply an independent standard of review.[7]

## II. The Trial Court Did Not Err in Applying Collateral Estoppel

On appeal Red asserts the trial court erred in giving the bankruptcy court's dischargeability factual findings collateral estoppel effect to preclude him from contesting liability on the wrongful death claims. First, Red points out collateral estoppel applies only where the parties had a "full and fair" opportunity to litigate in the prior action. He claims he did not have a full or fair chance to litigate because the factual findings in the bankruptcy court were made by a judge rather than a jury – a circumstance, according to Red, that directly contravenes 28 United

[7] In any event, the appropriate standard of review is not dispositive in this appeal. We reviewed the lower court's actions (and affirmed them) under the least deferential standard of review, thus even if we had applied the more deferential abuse of discretion standard, the result would not have changed.

States Code section 1411, subdivision (a) which expressly preserves the right to a jury trial in state court on the wrongful death claims (the "Right to a Jury Trial and 28 U.S.C.A. § 1411(a)" contention). Second, Red claims application of the collateral estoppel was unfair and did not satisfy the public policy reasons underlying the doctrine (the "Fairness Exception"). Our analysis of these contentions begins with a review of the legal principles governing collateral estoppel and the related concept of res judicata.

"The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation." (*Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1065.) The doctrine precludes parties or their privies from relitigating *a cause of action* that has been finally determined by a court of competent jurisdiction. This aspect of res judicata has traditionally been referred to as "res judicata" or "claim preclusion."

Res judicata also includes a broader principle relevant here and commonly referred to as "collateral estoppel" or "issue preclusion." Under this principle an *issue* necessarily decided in prior litigation may be conclusively determined as against the parties or their privies in a subsequent lawsuit on a different cause of action. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828-829.) "Thus, res judicata does not merely bar relitigation of identical claims or causes of action. Instead, in its collateral estoppel aspect, the doctrine may also preclude a

party to prior litigation from redisputing *issues* therein decided against him, even when those issues bear on different claims raised in a later case. Moreover, because the estoppel need not be mutual, it is not necessary that the earlier and later proceedings involve the identical parties or their privies. Only the party *against whom* the doctrine is invoked must be bound by the prior proceeding." (*Ibid.*)

Collateral estoppel applies when (1) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication, (2) there was a final judgment on the merits in the prior action and (3) the issue necessarily decided in the prior adjudication is identical to the one that is sought to be relitigated. (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201.)

In addition to these factors, and especially where collateral estoppel is applied "offensively" to preclude a defendant from relitigating an issue the defendant previously litigated and lost, the courts consider whether the party against whom the earlier decision is asserted had a "full and fair" opportunity to litigate the issue. (*Parklane Hosiery Company, Inc. v. Shore* (1979) 439 U.S. 322, 332-333; *Kremer v. Chemical Construction Corporation* (1982) 456 U.S. 461, 480-481; *Sutton v. Golden Gate Bridge, Highway and Transportation District* (1998) 68 Cal.App.4th 1149, 1157.)

To that end, the courts have recognized that certain circumstances exist that so undermine the confidence in the validity of the prior proceeding that the application of collateral estoppel would be "unfair" to the defendant as a matter of law. (*Kremer v. Chemical Construction Corporation, supra,* 456 U.S. at p. 481 ["Redetermination of issues

is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in the prior litigation"].) Such "unfair" circumstances include a situation where the defendant had no incentive to vigorously litigate the issue in the prior action, "particularly if the second action is not foreseeable." (*Securities Exchange Commission v. Monarch Funding Corporation* (2nd Cir. 1999) 192 F.3d 295, 304; *Parklane Hosiery Company, Inc. v. Shore, supra,* 439 U.S. at p. 330.) Another such circumstance occurs when the judgment in the prior action is inconsistent with previous judgments for the defendant on the matter. (*Parklane Hosiery Company, Inc. v. Shore, supra,* 439 U.S. at pp. 330-331.) Finally, application of collateral estoppel is unfair where the second action "affords the defendant procedural opportunities[8] unavailable in the first action that could readily cause a different result." (*Id.* at p. 331.) With these legal principles in mind, we turn to Red's contentions on appeal.

### A. Right to a Jury Trial and 28 United States Code section 1411, subdivision (a)

Preliminarily we note Red *does not* contest that he was a party in the bankruptcy proceedings, that the bankruptcy court order was final on the merits, or that the issue necessarily decided in the bankruptcy proceeding was identical to the one he sought to relitigate in the

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[8] The only examples of "procedural opportunities" cited in *Parklane* were: (1) where the defendant was forced to defend the first action in an inconvenient forum not of the defendant's choosing; or (2) where in the first action the defendant was "unable to engage in full scale discovery or call witnesses." (*Id.* at p. 331, fn. 15.)

wrongful death action.[9] Instead he claims that he was denied a "full and fair" opportunity to litigate the issue in the bankruptcy court. He argues that applying collateral estoppel was improper because the state court wrongful death action afforded him a "procedural opportunity," that is, a right to a jury trial, unavailable in the federal bankruptcy court discharge proceeding.

This argument fails for several reasons. First, an additional procedural opportunity is meaningful only where it "could readily cause a different result" in the action. (*Parklane Hosiery Company, Inc. v. Shore, supra,* 439 U.S. at p. 331.) We are not convinced that a jury acting as the trier of fact on the liability issues would readily have reached a different result than the judge in the bankruptcy proceeding. As the Supreme Court observed in *Parklane Hosiery,* "the presence or absence of a jury as factfinder is basically a neutral, quite unlike, for example, the necessity of defending the first lawsuit in an inconvenient forum." (*Id.* at p. 332, fn. 19.) The jury hearing the same facts and essentially the same evidence and arguments concerning Red's mental state and causation, should reach the same conclusion as a judge assessing those matters.

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[9] As respondents correctly point out to prevail in the bankruptcy discharge proceeding they were required to prove Red acted "willfully and maliciously" in causing the injuries. (See 11 U.S.C., § 523, subd. (a)(6) ["A discharge under . . . this title does not discharge an individual debtor from any debt . . . for willful and malicious injury by the debtor to another . . . "].) Proof of "willful and malicious injury" requires (1) a wrongful action, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse. (*In re Jercich* (9th Cir. 2001) 238 F.3d 1202, 1208-1209.) In contrast, California's wrongful death statute required a showing that Red acted with a less culpable mental state – negligence. (See Code Civ. Proc., § 377.60.)

This notwithstanding, the more fundamental failing in Red's argument is that the right to a jury trial "poses no insurmountable barrier to applying collateral estoppel." (*Securities Exchange Commission v. Monarch Funding Corporation, supra,* 192 F.3d at p. 304.) Notably absent from *Parklane Hoisery's* list of "procedural opportunities" (missing from first action which would undermine the application of collateral estoppel in a subsequent action) is the right to a jury trial. Indeed, the Supreme Court in *Parklane Hoisery* expressly held that the application of offensive collateral estoppel did not violate the Seventh Amendment right to a jury trial. (*Parklane Hosiery Company, Inc. v. Shore, supra,* 439 U.S. at pp. 336-338.) Thus, the *Parklane Hosiery* court concluded the unavailability of a jury trial in the first proceeding did not preclude the application of collateral estoppel in the second action. (*Ibid.*) The California State Supreme Court has likewise concluded that notwithstanding the state constitutional jury trial guarantee, the lack of a jury trial on contested factual issues in one proceeding does not preclude application of collateral estoppel in a subsequent proceeding. (*People v. Sims* (1982) 32 Cal.3d 468, 484, fn. 13 ["any right to a jury trial . . . is only a right to submit to a jury issues of fact which are triable. When issues of fact have been conclusively resolved against [a party in a prior action], application of collateral estoppel to take those issues from the jury does not violate the . . . right to a trial by jury"]; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 344.)

Red recognizes *Parklane Hosiery* and *Sims*[10] resolve the question of whether the right to a jury precludes the application of collateral estoppel against him. Red, nonetheless, asserts application of collateral estoppel in this case violated 28 United States Code section 1411, subdivision (a)[11] – a statute which he asserts guarantees his right to a jury trial in the wrongful death action irrespective of the bankruptcy court's findings in the discharge proceedings or the doctrine of collateral estoppel.[12]

Section 1411, subdivision (a) provides, in pertinent part: "[T]his chapter and title 11 do not affect any right to a trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." (§ 1411, subd. (a).)

Red construes section 1411, subdivision (a) as providing that no bankruptcy court order or finding can be used to deny a party a right to a jury trial in a wrongful death action. He concludes that when the court applied collateral estoppel here and thus precluded him from contesting liability in the wrongful death action, the court effectively used the bankruptcy court's findings to deprive him of his right to a jury trial in direct contravention of section 1411,

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[10] While recognizing this court is bound by it, Red disagrees with the principle announced in *Sims*, citing instead to a Texas state court of appeals decision (*Trapnell v. Sysco Food Services, Inc.* (Tex. App. 1992) 850 S.W.2d 529, 543-546) as authority for the proposition "application of collateral estoppel here violates California Constitution's jury trial right."

[11] Hereinafter referred to as "section 1411."

[12] Red failed to raise the application of section 1411, subdivision (a) in the trial court. While this results in a waiver of the argument on appeal, we nonetheless address the merits because they concern only legal issues.

subdivision (a). Red concludes the trial court should have denied the respondents' motion in limine because section 1411, subdivision (a) is an insurmountable barrier to collateral estoppel in this case.

While at first glance Red's interpretation of section 1411 and its implication on the doctrine of collateral estoppel appears to follow logically from the language of the statute, closer scrutiny of the provision does not support his view. Red cites no legal authority for his reading of section 1411, subdivision (a). Nor does a review of the legislative history of the section, or relevant bankruptcy legal authority serve to legitimize his interpretation.

**Background of Section 1411.** In 1978 Congress extensively revised the federal bankruptcy laws and expanded the jurisdiction of the bankruptcy courts. Under the 1978 Bankruptcy Act disputes tangentially related to bankruptcy that previously could only be adjudicated in state or federal district courts, now could be heard in bankruptcy court. To ensure litigants' (non-bankruptcy law) rights to a jury trial would not be lost in such cases, Congress provided for the preservation of jury trial rights by allowing bankruptcy courts to conduct such trials. (See 28 U.S.C., §§ 1471 & 1480 (1982) [repealed 1984]; S. Elizabeth Gibson, *Jury Trials in Bankruptcy: Obeying The Commands of Article III and the Seventh Amendment,* Minn. L.R. (1988) pp. 968, 983.)[13]

[13] Title 28 United States Code section 1480 as enacted in 1987, provided in pertinent part: "[T]his chapter and title 11 do not affect any right to a trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979." The

(Continued on following page)

When the United States Supreme Court in *Northern Pipeline Const. Co. v. Marathon Pipeline Co.* (1982) 458 U.S. 50, 84-87, held unconstitutional the jurisdictional grant of authority to the bankruptcy courts under the 1978 Act, it did so on the basis that Article III powers were unconstitutionally conferred on non-Article III bankruptcy judges. The *Marathon* court reasoned the broad grant of jurisdiction violated Article III because it permitted bankruptcy judges who lacked tenure and salary protections mandated by Article III, to hear and decide state common law actions without the parties' consent. (*Id.* at p. 87.) While *Marathon* did not expressly hold that the bankruptcy judge's authority under the 1978 Act to conduct jury trials rendered the jurisdictional provisions of the 1978 Act unconstitutional, the decision cast doubt on the authority of bankruptcy judges to conduct such trials.[14] Courts subsequently have interpreted *Marathon* to mean that it is unconstitutional for bankruptcy judges to conduct jury trials. (See e.g., *In re American Energy* (Bankr. D.N.D. 1985) 50 B.R. 175, 181.)

In response to *Marathon,* Congress quickly passed the Bankruptcy Amendments and Federal Judgeship Act of

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legislative history of section 1480 suggests Congress enacted the jury trial provision to ensure that notwithstanding the expansion of the bankruptcy court's jurisdiction, the 1978 Act would not infringe on the parties' pre-existing rights to a jury trial prior to the effective date of the law. Nothing in the language of section 1480 or its legislative history indicates Congress intended to expand the right to a jury trial or create new jury trial rights. (See Gibson pp. 983-984.)

[14] With regard to such jury trials at least one bankruptcy court has concluded: "[b]ut for *Marathon,* there would be no question but that the bankruptcy court had the necessary statutory authority to conduct jury trials." (*In re Adams, Browning & Bates Ltd.* (Bankr. E.D.N.Y. 1987) 70 B.R. 490, 496.)

1984 (the 1984 Amendments). The 1984 Amendments retained the non-Article III stature of bankruptcy judges but reduced their authority over judicial proceedings to comply with Article III's apparent requirement that the essential functions and attributes of judicial power be vested in Article III courts. (Gibson at p. 992.)

Among various alterations to the law, Congress eliminated the 1978 Act's broad jury trial provision, section 1480 and replaced it with section 1411, which limited jury trial rights to wrongful death and personal injury actions. The legislative history of section 1411 shows its drafters, like their predecessors who drafted section 1480, intended merely to preserve the right to a jury trial only insofar as it existed under non-bankruptcy law; they did not intend to expand or create a new source of jury trial rights. (See 130 Cong. Rec. S7618-19 (daily ed. June 19, 1984) [Senator Heflin explained the intent of jury trial provision as: "[W]here a . . . party would have a right to a jury trial on an issue of fact pursuant to Federal or State law absent the application of bankruptcy laws, this [jury trial provision] ensures that such rights remain intact" and that the provision was intended "to maintain the status quo" and "not to alter rights to jury trials which might have existed under State or Federal law prior to 1978"].)

Furthermore, Congress preserved jury trial rights in the 1984 Amendments for personal injury and wrongful death actions not because it was constitutionally mandated under *Marathon* or the Seventh Amendment but because of the strong lobbying efforts of the personal injury tort bar. (See *In re Ice Cream Liquidation, Inc.* (Bankr. D.Conn. 2002) 281 B.R. 154, 161.) Congress also recognized that personal injury and wrongful death tort

claimants, unlike most other creditors in bankruptcy proceedings, had not voluntarily associated with the debtor. (See Roger S. Braugh, Jr., *Personal Injury and Wrongful Death Claims in Bankruptcy: The Case for Abstention* (1995) 47 Baylor L. Rev. 151, 159.) Thus, section 1411 was designed with the protection and interests of tort claimants/creditors rights, rather than debtors, in mind. "The objective of [section 1411] is to prevent a debtor from taking away the protections provided under state law from creditors who depend on them the most." (Gregory A. Bibler, *The Status of Unaccrued Tort Claims in Chapter 11 Bankruptcy Proceedings* (1987) 61 Am. Bankr. L.J. 145, 179.) According to Senator Heflin: "Congress never intended that the filing of a bankruptcy petition by a debtor act as an escape hatch from jury trials." (130 Cong. Rec. S7619 (daily ed. June 19, 1984).)[16]

Finally, this court found no evidence in the legislative history that Congress intended section 1411 to guarantee a jury trial in every wrongful death or person injury tort case, even where the doctrine of collateral estoppel would otherwise (under non-bankruptcy law) preempt the right to a jury trial.

Our detour into bankruptcy law clarifies several matters that inform our interpretation of section 1411, subdivision (a). First, it is apparent from the legislative

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[16] Congress further safeguarded the interests of personal injury and wrongful death creditors by providing that bankruptcy courts have no jurisdiction to liquidate (or to conduct proceedings affecting liquidation) of personal injury or wrongful death claims. (See 28 U.S.C., § 157, subds. (b)(2)(B) and (b)(2)(O). The 1984 Amendments also deprive bankruptcy courts of jurisdiction to conduct wrongful death or personal injury trials. (See 28 U.S.C., § 157, subd. (b)(5) [requiring personal injury tort claims to be tried in the district court].)

history section 1411, subdivision (a) does not create any additional procedural or substantive rights to a jury trial. Thus, Red's interpretation of section 1411, subdivision (a) is too expansive. The statute preserves the right to a jury trial in a wrongful death action *only* to the extent that the right to a jury trial existed under the applicable non-bankruptcy law (i.e., under the Constitution or relevant statute).[16] And as discussed elsewhere above, the Federal and California state constitutional jury trial guarantees give way to the application of collateral estoppel.[17]

Second, nothing in the case law, legislative history or statutory scheme indicates that section 1411 operates to supplant the well-established doctrine of collateral estoppel. As Red points out, the bankruptcy court had no authority to conduct a jury trial in the discharge proceeding (e.g., *In re Hashemi* (9th Cir. 1997) 104 F.3d 1122, 1124). Similarly the bankruptcy court would not have had jurisdiction to liquidate the wrongful death claim or conduct a trial in the action. (28 U.S.C., § 157, subds. (b)(2) & (b)(5); see *Grogan v. Garner* (1991) 498 U.S. 279, 283-284; *In re Santos* (Bankr. D. N. J. 2004) 304 B.R. 639,

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[16] The right to a jury trial in a wrongful death action stems from the California Constitution, Article I, section 16 and the Code of Civil Procedure section 592 (in a civil action for "injuries" an "issue of fact must be tried to a jury"). (See *DeCastro v. Rowe* (1963) 223 Cal.App.2d 547, 552.)

[17] In our view, the statutory right to a jury trial in Code of Civil Procedure section 592 does not foreclose the application of collateral estoppel here. Section 592 guarantees a jury trial only for "issues of fact." Where, however, a competent trier of fact in a prior proceeding has conclusively determined the factual issues, then no "triable" issue of fact remains for jury's resolution. (See *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 746 [in absence of triable question of fact, no right to a jury trial exists].)

647.)[18] But the limitations imposed upon the bankruptcy court's authority and jurisdiction and the inherent distinctions between bankruptcy discharge proceedings and wrongful death claims are simply beside the point.

Red has not shown that section 1411 or any other bankruptcy provision precludes a state court presiding over a wrongful death action from giving preclusive effect to bankruptcy findings on issues identical to those raised in a state wrongful death case and actually litigated and determined in the bankruptcy proceeding. (See *Martin v. Martin* (1970) 2 Cal.3d 752, 759, 765 [bankruptcy court's interpretation of parties' property settlement agreement as well as the order the debt was not subject to discharge given collateral estoppel effect in subsequent state court action between the parties]; *Levy v. Cohen* (1977) 19 Cal.3d 165, 172-174 [bankruptcy court order releasing defendants from liability for certain obligations of limited partnership was res judicata in state court action concerning defendants' liability partnership debts].) Full faith and credit must be given to an order of the federal court and such an order has the same effect in the courts of this state as it would have in a federal court. (See *Lumpkin v. Jordan* (1996) 49 Cal.App.4th 1223, 1232 ["Where dispositive factual issues are actually litigated and resolved in the federal action, the losing party is estopped to relitigate

[18] Nonetheless, bankruptcy courts sometimes make determinations that relate to the underlying merits of tort claims. (See *In re Chateaugay* (Bankr. S.D. N. Y. 1990) 111 B.R. 67, 78; *In re Aquaslide N'Dive Corp.* (9th Cir. BAP 1987) 85 B.R. 545, 548.) Both *Aquaslide* and *Chateaugay* construed 28 United States Code section 157 to allow the bankruptcy court to make dispositive rulings on personal injury claims as part of its jurisdiction over allowance and disallowance of claims.

those issues in a subsequent state action"]; *Levy v. Cohen, supra,* 19 Cal.3d at pp. 172-173.)

In sum, we are not convinced the trial court's order giving the bankruptcy court's findings preclusive effect on the issue of liability in the wrongful death actions violated section 1411. The bankruptcy code did not provide Red with any additional right to a jury trial that could block the application of the doctrine of collateral estoppel in state court. Section 1411 recognizes that any right to a jury trial arose from non-bankruptcy law, and Red has failed to demonstrate that such jury trial rights were offended by the application of collateral estoppel. Furthermore Red offers no other argument to show he was denied a "full and fair" opportunity to litigate in the bankruptcy proceedings.[19] As a result we conclude the trial court properly found the threshold requirements for collateral estoppel.

**B. Fairness Exception.**

Notwithstanding Red's arguments with respect to section 1411, he also claims the application of collateral estoppel was unfair and did not satisfy the public policy purposes underlying the doctrine. We do not agree.

Even where minimum requirements for collateral estoppel are established, the doctrine will not be applied "if injustice would result or if the public interest requires that relitigation not be foreclosed. [Citations.]" (*Consumers*

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[19] Red does not deny he had a full and fair opportunity to conduct discovery and present his evidence and arguments in the bankruptcy proceeding. Moreover because he chose the venue he cannot complain that he had to defend the action in an inconvenient forum.

*Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902.) Thus the court must also consider whether the application of collateral estoppel in a particular case will advance the public policies which underlie the doctrine. (*Younan v. Caruso* (1996) 51 Cal.App.4th 401, 407.) "The purposes of the doctrine are to promote judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which undermine the integrity of the judicial system and to protect against vexatious litigation." (*Ibid.*)

Red asserts these purposes were not served in this case. First, he claims it is unfair to apply the doctrine when the bankruptcy judge and Roos' bankruptcy counsel both made comments in the bankruptcy proceeding which indicated a belief that Red would have an opportunity to contest liability in the wrongful death action. In view of these comments, Red asserts that maintaining the "integrity of the judicial system" required the trial court to reject the application of collateral estoppel.

We are not persuaded such remarks undermine the policy objectives of the doctrine. The bankruptcy court's comments were made *after* it issued the opinion in the dischargeability proceeding. There is no evidence the bankruptcy court considered such matters when it issued the dischargeability findings or that if it did, that those beliefs played any role in the court's findings. In any event, even if the bankruptcy court based its findings on the assumption Red would have the chance to re-litigate intent and causation in the state court action, that assumption, as this opinion concludes is erroneous. Collateral estoppel may apply even where the issue was wrongly decided in the first action. "'An erroneous judgment is as conclusive as a correct one.'" (*Martin v. Martin, supra,* 2

Cal.3d at p. 763, quoting *Panos v. Great Western Packing Co.* (1943) 21 Cal.2d 636, 640.)

Red also argues it is unfair to apply collateral estoppel because it did not avoid "vexatious or repetitive litigation." He maintains the wrongful death trial would have been significantly different than the bankruptcy proceedings, not only because of the jury's presence, but also because he had an "important new witness" who did not testify in the bankruptcy proceedings. Red asserts that after the bankruptcy proceeding he was finally able to locate and depose the driver of the car he rear-ended in the intersection. He claims that if called to testify, the other driver would provide evidence consistent with Red's theory of the case (i.e., that Red was unconscious and acted involuntary [sic].)

The problem with this contention is the existence of "new evidence" normally does not bar the application of collateral estoppel. (See *Robert J. v. Leslie M.* (1997) 51 Cal.App.4th 1642, 1647-1648 [court denied relitigation of same claim notwithstanding fact that new evidence was unavailable in earlier proceeding].) In any event, Red has not demonstrated that this evidence is "new" or was "previously unavailable.[20] Moreover, the other driver's testimony goes to the weight of the evidence supporting Red's version of the case; it does not establish a previously undiscovered defense theory nor does it result in a change in the parties legal rights. "Any exception to collateral estoppel cannot be grounded on an alleged discovery of more persuasive evidence. Otherwise there would be no

[20] It appears the other driver was known to Red before the bankruptcy proceedings. As a result of the collision the other driver filed an action and obtained a default judgment against Red.

end to the litigation." (*Evans v. Celotex* (1987) 194 Cal.App.3d 741, 748.)

In sum, in our view the integrity of the judicial system was served, judicial economy was promoted and vexatious litigation was avoided by the trial court's decision. Application of collateral estoppel in this case gave credit to factual findings made by a competent court, acting within the scope of its jurisdiction, and in a forum where the parties were afforded a fair and full opportunity to present their evidence and arguments and appellate review of adverse rulings was available.

Finally, we observe Red may have obtained a jury trial in state court on the liability issues, if he had joined in, rather than opposed the respondents' request for relief from the bankruptcy stay. If the case had gone that procedural route, Red would have been no worse off. To that end, had Red prevailed in the wrongful death action (i.e., convinced the jury he lacked the requisite "negligent" mental state to be liable on wrongful death claims) the bankruptcy discharge proceeding would have been unnecessary. If on the other hand, he [sic] had he lost in the state court, he nonetheless would have been able to litigate the dischargeability of the claims in the bankruptcy court. Instead Red vigorously opposed the request for a relief from stay and the case took a different route. Red asked the bankruptcy court to "determine the facts." The bankruptcy court did just that. Although Red was disappointed with the result, neither his disappointment nor any other argument he has presented to this court, convinces us that the trial court's decision to give the facts as determined by the bankruptcy court collateral estoppel effect was unfair or contrary to the law.

## *DISPOSITION*

The judgment is affirmed. Costs on appeal are awarded to respondents.

**CERTIFIED FOR PUBLICATION**

WOODS, J.

We concur:

PERLUSS, P.J. JOHNSON, J.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES**

| | |
|---|---|
| NILDA ROOS, WILLA BAUM.<br>Plaintiff(s) | CASE NUMBER<br>SC061977 C/W SC066841 |
| vs<br>ERIC RED<br>Defendant(s) | JUDGMENT ON VERDICT IN OPEN COURT |

(Filed Nov. 24, 2003)

This action came on regularly for trial on November 20, 2003, in Department WE-M of the Superior Court, the Honorable Lorna Parnell, Judge Presiding; the plaintiffs appearing by attorneys, Carlos A. Lloreda, Jr., of the Law Offices of Carlos A. Lloreda, Jr., and Brandon D. Baum, of the firm of Cooley Godward LLP, and the defendant appearing by attorney, John Doherty, of the firm of Dohery & Catlow.

A jury of twelve persons was regularly impaneled and sworn to try the action. Witnesses on the part of the plaintiffs and the defendants were sworn and examined. After hearing the evidence, the arguments of counsel, and the instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and being called answered to their names and duly rendered their verdict in writing and words and figures, to-wit:

**TITLE OF COURT AND CAUSE**

What is the total amount of damages, including economic and non-economic damages, sustained by Nilda Roos as a result of the death of David Roos?

(a) Economic Damages: $12,328.69

(b) Non-Economic Damages: $500,000.00

TOTAL: $512,328.69

Dated: 11-24-03 Leonard Shapiro
Foreperson

**TITLE OF COURT AND CAUSE**

What is the total amount of damages sustained by Willa Baum as a result of the wrongful death of Noah Baum?

Total: $500,000.00

Dated: 11-24-03 Leonard Shapiro
Foreperson

**WHEREFORE,** by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said, plaintiff, Nilda Roos, have and recover from said, defendant, Eric Red, economic damages in the sum of $12,328.69, and non-economic damages in the sum $500,000.00, for a total of $512,328.69, with interest thereon at the rate of ten per cent per annum from the date of the verdict until paid together with costs and disbursements amount to the sum of $___.

**WHEREFORE,** by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said, plaintiff, Willa Baum, have and recover from said, defendant Eric Red, damages in the sum of $500,000.00 with interest thereon at the rate of ten per cent per annum from the date of the verdict until paid

together with costs and disbursements amount to the sum of $___.

Dated: 11-24-03

/s/ Lorna Parnell
Lorna Parnell
Judge of the Superior Court

**SUPERIOR COURT OF CALIFORNIA,**
**COUNTY OF LOS ANGELES**

| | |
|---|---|
| Date: 11/19/03 | **DEPT. WEM** |
| HONORABLE LORNA PARNELL JUDGE | G. Tapanes DEPUTY CLERK<br>L. Robles CSL/CT ASST.<br>ELECTRONIC RECORDING MONITOR |
| HONORABLE JUDGE PRO TEM #11 | W. SCHRIVER CSR #7271 Reporter |
| NONE Deputy Sheriff | |

9:30 am SC061977

NILDA ROOS ET. AL.
VS
ERIC RED ET. AL.
CONSOL./W SC065723, SC066024
SC066841, SC066705, SC066838

Plaintiff
Counsel CARLOS LLOREDA (X)
BRANDAN BAUM (X)

Defendant
Counsel JOHN DOHERTY (X)

**NATURE OF PROCEEDINGS:**

JURY TRIAL; TIME ESTIMATE 10 DAYS

Cause is called for trial

Plaintiff's motion in limine re Collateral Estoppell is called for hearing and argued.

Plaintiff's motion in limine re Collateral Estoppell is granted. The order of the Bankruptcy court regarding liability of the defendant shall stand. Defendant may not dispute the issue of liability in this case.

Plaintiffs demand a jury trial. The time estimate is now 3 days.

In light of the Court's calendar, the trial in this matter will be trailed on a daily basis. Counsel are to contact the Court this afternoon regarding the court's status. Counsel are to meet and confer regarding the joint statement of the case and proposed jury instruction.

Notice is waived.

**MINUTES ENTERED**
11/19/03
**COUNTY CLERK**

[SEAL]

**SIGNED this 04 day of February, 2003.**

FRMonroe

**FRANK R. MONROE**
**UNITED STATES**
**BANKRUPTCY JUDGE**

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**UNITED STATES BANKRUPTCY COURT**
**WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

| | |
|---|---|
| IN RE:<br>ERIC RED<br>DEBTOR | CASE NO.<br>01-13827-FM<br>(Chapter 7) |
| WILLA BAUM<br>PLAINTIFF<br>VS.<br>ERIC RED<br>DEFENDANT | ADVERSARY NO.<br>02-1010-FM |
| NILDA ROOS<br>PLAINTIFF<br>VS.<br>ERIC RED<br>DEFENDANT | ADVERSARY NO.<br>02-1011-FM<br>CONSOLIDATED<br>UNDER ADVERSARY<br>NO. 02-1010-FM |

## MEMORANDUM OPINION

The Court held a trial on the merits of the above two adversary proceedings on November 12, 2002. The parties later submitted written closing arguments on December 2,

2002. This written memorandum constitutes written Findings of Fact and Conclusions of Law as required under Bankruptcy Rule 7052. These two adversary proceedings are core proceedings under 28 U.S.C. § 157(b)(2)(I). Accordingly, these matters both arise under Title 11 and in a case under Title 11. This Court, therefore, has the jurisdiction to enter a final order pursuant to 28 U.S.C. § 1334(a) and (b), 28 U.S.C. § 157(a) and (b)(1), 28 U.S.C. § 151 and the Standing Order of Reference in the United States District Court for the Western District of Texas.

## WHAT THIS DISPUTE IS ALL ABOUT

On May 31, 2000, Debtor was driving his Jeep on Wilshire Blvd. in Los Angeles, California. He was stopped at a red light, the second car from the front behind a white Honda in the inside, or "fast" lane. All of a sudden, the Debtor's Jeep lurched forward, hit the white Honda, pushed it into the intersection even though the white Honda's driver had the brakes on, veered off of the white Honda to the left, accelerated across the street and crashed into a billiard parlor/bar killing two people.

Plaintiff's allege that the actions of the Defendant violated 11 U.S.C. § 523(a)(6) and their claims should be determined non-dischargeable so that they can return to state court in California to have them liquidated.

Defendant claims that he suffered an episode of Syncope which Webster's Dictionary defines as "a fainting or loss of consciousness, caused by a temporary deficiency of blood supply to the brain".

## THE LAW

Debts incurred by "willful and malicious injury" to the person or property of another are excepted from discharge under 11 U.S.C. § 523(a)(6). The Supreme Court interpreted this statute in 1998. It determined that the word "willful" modifies the word "injury" and therefore, in order to violate the statute, a debtor must have intended the injury which resulted and not simply intended to commit the act which resulted in the injury. *Kawaahau v. Geiger*, 523 U.S. 57 (1998).

The Fifth Circuit Court of Appeals has determined that a debtor who was tapping a loaded shotgun upon the window of another party's vehicle in order to get his attention (in an obviously intimidating and threatening manner) was not a violation of 11 U.S.C. § 523(a)(6) when the shotgun went off and injured the party in the vehicle because the record was clear that the shotgun went off "accidentally" and that the perpetrator had not intended to shoot the injured party. *Matter of Delaney*, 97 F.3d 800 (5th Cir. 1996).

Since the Supreme Court decision in Kawaahau, the Fifth Circuit has had an opportunity to further apply the willful and malicious standard. It has stated that "an injury is 'willful and malicious' where there is either an objective substantial certainty of harm or subjective motive to cause harm." *In re Miller*, 156 F.3d 598, 606 (5th Cir. 1998), cert. denied 526 U.S. 1016 (1999).

"[S]ince a debtor rarely admits to a wrongful intent, the use of objective evidence generally must be utilized to determine whether malice exists." *In re Long*, 774 F.2d 875, 881 (8th Cir. 1985).

Stated another way, if the Debtor in this case intentionally drove his Jeep into a billiard parlor/bar on Wilshire Blvd. in the early evening when traffic was heavy and people were beginning to assemble in bars and restaurants after work at such a high rate of speed that the vehicle came to rest fully inside the establishment and stopped only after hitting the bar, one should easily conclude that he acted with an objective substantial certainty of harm to those parties who were injured and killed.

It is hard for one to imagine a more evil action if that was what truly occurred.

## EXAMINATION OF THE TESTIMONY

### ERIC RED

Debtor, Red, claims an attack of Syncope. He was divorced from his first wife in 1994 in Santa Monica, California. He had been, and apparently still is, a film director/screen writer with some degree of success having concentrated his efforts in unusual class B movies, most of which have episode [sic] of violence in them. He had one daughter from his first marriage whom he generally visited on Wednesdays. May 31, 2000 was a Wednesday. He cancelled his visitation that day.

On that day, Mr. Red had been working on a film script in his apartment. He testified that he had not eaten all day so he left his residence between 5:00 and 6:00 p.m. and drove in his 1994 Jeep Grand Cherokee to a McDonald's on nearby Wilshire Blvd. several blocks from the billiard pub he ultimately crashed into. He says that he was feeling sick as he entered the McDonald's parking lot,

some nausea and dizziness. There was no place to park so he pulled out into the street looking for a parking place. He turned on the side street and could not find parking places and noticed that the traffic was moderate even though his nausea and dizziness was apparently increasing. He drove down the street to the corner of Wilshire Blvd. The traffic was very congested at that time as it usually is according to his testimony. He was still looking for a parking space. However, after turning onto Wilshire Blvd. he was in the inside lane, there being three lanes on each side of Wilshire Blvd. at that point. He states that he was getting progressively sicker and not thinking clearly, that he was starting to see yellow spots – flashes of light. His nausea was replaced by disorientation, a lack of feeling in the extremities, and a feeling that he was going to pass out. He said it came on so quickly he could do nothing about it. The next thing he remembers is that he came to consciousness in his vehicle inside the billiard pub. He then got out of the vehicle, picked up a piece of broken glass, and cut his throat – no arteries were, however, severed. He was taken to the UCLA Hospital after the accident and apparently underwent extensive testing. He was kept there for some nine days as they considered him a suicide risk. It is unclear that the doctors at UCLA Medical Center ever confirmed an episode of Syncope.

In interviews with the police, he attributed his unconscious state to an attack of Syncope.

The Debtor never recalls having any infection of the nervous system, a head injury, or a concussion. He testified that he had had these attacks of unconsciousness two or three times before, twice during bowel movements when he experienced a very great pain in his testicles and the other time as a result of a very great leg and foot pain.

They occurred in 1990 in Toronto, Canada and in 1994 in Santa Monica, California. He did not tell anyone at the time, did not call a doctor, or 911, and does not recall if he told his wife at the time.

***DOCTOR RUBIN***

Mr. Red consulted with a Doctor Herbert Rubin in 1994 once, six years prior to the accident. After the accident, Mr. Red got Doctor Rubin to write a letter "To Whom It May Concern" on July 10, 2000 in which he stated that "Eric Red has been under my medical care since 1994. He is a thirty-nine year old gentleman who has had recurrent episodes of Syncope and transient losses of consciousness, which have been thought to be due to vaso-vagal episodes. They have occurred with micturition with defecation and in response to stimuli such as pain."

This letter was written in spite of the fact that prior to the accident Doctor Rubin had seen Mr. Red only once. Accordingly, the statement by Doctor Rubin that Mr. Red had been under his medical care since 1994 is, if not an outright lie, an incredible overstatement of the facts. In fact, in his deposition of April 12, 2001, Doctor Rubin admitted as such. He further says that with regard to his consultation with Mr. Red, "I saw him as an expert in gastroenterology." In the deposition testimony, Doctor Rubin admits he never made a diagnosis of Syncope but that Mr. Red arrived upon the referral from a Doctor Stein saying he had Syncope. (See Defendant Eric Red's Exhibit 31 – Deposition of Herbert Alan Rubin, M.D. on April 12, 2001, pgs. 17-19).

There are other inaccuracies in the Rubin letter as well. The Defendant admitted at trial that contrary to the

representations in the Rubin letter, he had not made several visits to emergency rooms as contained in the letter. The Defendant also admitted that he had not undergone "extensive cardiovascular and neurological evaluations at UCLA and elsewhere". These statements, based upon the testimony of Doctor Rubin, were placed into the letter because that's what Mr. Red had told him. Thus, the letter is more evidence of a fabrication of Syncope than it is of an extensive medical history of Syncope.

**EYE WITNESSES**

The eye witness accounts are not consistent on their face. However, that may be partially explained as each witness basically saw the Defendant in his car at different times. Two witnesses apparently support Mr. Red's claim that he was unconscious. A Mr. Devor Forte was at a bus stop on the south side of the intersection of Wilshire Blvd. at Westgate waiting for a bus. He said he saw Mr. Red's Jeep impact the Honda when he heard it shatter the license plate and glass and the white car driver being thrown back into his seat. He says the driver of the Jeep was leaning to the right with his eyes closed and that he appeared to be sleeping or something and that he was not conscious. But he also testifies that Mr. Red's car was in the outside lane when, in fact, it was in the inside lane. He also testified that there were only two cars in the intersection which is contrary to Mr. Red's testimony that the traffic on Wilshire Blvd. was congested as it always was that time of day. Mr. Forte says the two cars hit and then there was a pushing by Mr. Red's car of the white car in front. He also admits that if the accident had occurred in the inside lane – "the fast lane" – he would not have been able to see if the driver was conscious or unconscious.

Mr. Steve Heimler was in the restaurant. He told the police officer that the driver appeared to be unconscious – his head on his right shoulder – although he did not appear to be completely sure of what he had seen. This is probably because he was sitting at a table that had been hit by Mr. Red's Jeep and he was propelled backwards as a result. Even though Heimler testified that the Defendant's head was to the side, he was not sure whether it was before or after the Jeep slammed into the bar. And, after the Jeep hit the bar, Heimler testified that the Defendant appeared to be stunned.

As pointed out by Plaintiff Willa Baum in her written closing argument, this clearly would be consistent with the facts since the Defendant's head most likely had struck either the steering wheel, dashboard, or windshield since he had blood on his face.

The other eye witnesses appear to support the conclusion that Mr. Red was awake. Alicia Thompson was inside the bar and saw the car come crashing through the glass front doors at a high rate of speed. She said the male driver of the vehicle seemed to be conscious as he had a look of shock on his face. She testified that he was not slumping but was sitting erect and conscious while the Jeep was in motion. The car struck the bar about six to seven feet away from where she was sitting and she testifies again on cross-examination that Mr. Red appeared to be wide-eyed – in shock.

A Mr. Levy testified that he was in the left lane heading east at the corner of Wilshire and Westgate which was a regular route that he took and that the traffic was moderate to heavy. He said he saw Mr. Red's car pushing a white car across the lanes of traffic. He heard no collision

but saw Mr. Red's car slip off the car it was pushing and accelerate into the pub. The white car had its brake on and he could hear the acceleration and the revving of the motor of Mr. Red's car both before, during, and after it slipped off to the left side of the white car and raced into the pub. He said the driver had his hands on the wheel and seemed to be driving the car. He was not slumped over and accelerated into the pub. He estimated the speed of Mr. Red's vehicle at 35 mph when it hit the pub although it could have been faster. He said there was no intent to stop the vehicle and attributed the whole incident to "road rage".

Even if Defendant's head was to the side with eyes closed, such does not prove that Defendant was actually unconscious. It is just as plausible that overcome with a fit of rage, Defendant clenched the steering wheel, shut his eyes, leaned to the side and jammed the accelerator to the floor all in an attempt to push the car in front of him out of the way so that he could get on about his way; and, by the time his car slipped off the white car in front and began to accelerate, he was too quickly into the billiards/pub to do anything about it; and that is why he looked so stunned after the car hit the bar and came to a stop because he could not believe what he had done.

**OTHER WITNESS TESTIMONY**

Defendant's former wife testified that Mr. Red had put a gun to his head on prior occasions due to financial pressure and made statements like "I can't handle it anymore." These statements were made after their divorce on the telephone on several occasions. She testified that she was unaware of any episode where he had passed out

and had never heard of him passing out. She also testified that Mr. Red would cancel visitation with his daughter, as he did that day, when he was depressed – generally over money problems.

Dr. Thomas Hedge, Jr. was a bought and paid for expert who testified with regard to what "Syncope" was. He has no specialty in Syncope. None exists in the medical profession although he has seen patients for loss of consciousness at the university of Southern California Medical Center and has treated Syncope patients. He has testified more than 200 times and has testified not only in favor of clients of counsel for Nilda Roos but has also testified adverse to clients of counsel for Nilda Roos. He read the depositions of Doctor Rubin, Eric Red, and others. He read the UCLA medical records that resulted from Mr. Red's hospitalization there immediately after the accident. His testimony was that the UCLA records generated at that time show nothing with regard to any prior episodes of Syncope. Doctor Hedge opined that if, in fact, Mr. Red had suffered a true episode of Syncope while driving his motor vehicle, he would have had a loss of motor control. He testified that the body simply goes limp, not rigid, and that a limp body in a true episode of Syncope would not be able to push on an accelerator or do anything else because there is no muscle tone when your consciousness is turned off due to an episode of Syncope. He also testified that a suicide attempt after an episode of unconsciousness would be very uncommon.

Upon examination by Mr. Baum, Doctor Hedge testified that the UCLA diagnosis of a possible vaso-vagal Syncope was based upon the need to "confirm the prior episodes" and that had never happened.

Upon cross-examination by Mr. Sather, Doctor Hedge testified that no matter what the loss of consciousness, if a person's foot is on the accelerator, the result would be a slowing of the vehicle because the foot would no longer be able to press the accelerator down and there would clearly not be an acceleration.

## THE AFTERMATH

In August 2001, long after the accident and after institution of wrongful death suits by Willa Baum and Nilda Roos, Mr. Red moved to Austin. He did not bring anything with him but a computer and a bag of clothes. Everything else was in storage in Van Nuys, California. He stayed at a hostel where he worked for room and board for approximately three months. Two weeks of the time he stayed with a friend, Mandy Mercel. He had no rent expense in Austin although such was listed in the schedules. He filed this bankruptcy in October of 2001 claiming he had lived in Austin the greater part of the 180 days preceding the petition than he had lived anywhere else. Obviously that was not true. He had only lived here 60 days. He testified that he met a woman at a film fair in Austin and that he then initially returned to California in December 2001 on a business trip as he had been provided a round trip plane ticket. He never came back. He established a relationship with the woman he had met at the Austin Film Fair and moved in with her. Apparently that's where he still lives.

There is no evidence in the record that this was a relationship established prior to Mr. Red's move to Austin; however, the circumstances are somewhat suspect. Mr. Red moves here in August 2001 after being sued for

wrongful death actions by the heirs of the two people that were killed as a result of his car crashing into the billiard pub, files bankruptcy two months later using an attorney that was found by and recommended by the attorney hired by the insurance company representing him in California, and two months later he's back in Los Angeles permanently. Coincidence? Doubtful.

**MR. RED'S DEMEANOR AND CREDIBILITY**

One would expect that a person who had suffered a physical illness that had caused unconsciousness that had resulted in that person's car traveling into a business establishment and killing two people would exhibit some degree of contrition, sorrow, and remorse for the tragedy that resulted. Such, however, did not seem to be the demeanor of Mr. Red at trial. Instead, Mr. Red struck the Court as defensive, somewhat combative, and reticent in his testimony on cross-examination. It seemed to the Court, as if Mr. Red felt that he was being unduly "put upon" by having to appear and answer the questions propounded to him by counsel for Willa Baum and Nilda Roos.

Additionally, there were examples of prior inconsistent testimony that lead the Court to doubt his credibility. Defendant told the UCLA Medical Center at the time of his hospitalization after the accident that he had suffered five to six blackouts in the past and many episodes of near blackouts; and, that they were attributed to his pain episodes. Based upon that, the UCLA doctor (Doctor Moriguchi) concluded that he suffered from possible "vasovagal Syncope – but we need to confirm that he has had these episodes in the past and has undergone evaluation".

Mr. Red's testimony in this Court was that he had suffered two to three blackout episodes and that they occurred in 1990 in Toronto, Canada and in 1994 in Santa Monica, California, but that he had never told anyone, had never gone to the hospital, and had never seen a physician for the condition. And yet, he gets Doctor Rubin to write a letter for him in July of 2000 that he had had many of these episodes and had made numerous visits to emergency rooms because of it. His statements to Doctor Rubin were clearly a fabrication. The question that the Court has in mind is whether the three episodes he testified to in this Court were a fabrication as well.

## A MAJOR OVERRIDING FACT

Defendant's Jeep was sitting still in traffic behind a white Honda on the inside "fast lane" on Wilshire Blvd. at its intersection with Westgate. The light was red. The vehicle then began to move, hit the white Honda in front, the motor revved, pushed the white car out into the intersection, slipped off the car to the left, and continued to accelerate crashing into the billiard pub across the street and to the left coming to rest only after it had crashed into the bar well inside the establishment.

Mr. Levy testified that the vehicle was traveling at least 35 mph when it crashed into the billiard pub and maybe more. He attributed it to road rage.

Such known facts cannot be reconciled with Mr. Red's explanation of Syncope. If, in fact, Mr. Red had suffered an episode of Syncope while he was sitting in his car which was *at rest* behind another car at an intersection stopped at a red light, then his foot would have slowly slipped off the brake and his vehicle would have simply bumped into

the car in front of it and stayed where it was. Mr. Red's story is simply not consistent with the facts of what we know happened.

## CONCLUSION

Accordingly, the Court concludes that Mr. Red was conscious and alert and intentionally jammed his foot onto the accelerator pushing the car in front of him out of the way, that his car then slipped off the car in front of him after it was well into the intersection, veered to the left, crashed through the front doors of the billiard pub at a speed approaching 35 mph, crashed into the bar where it stopped after it had killed two people – and that all of this occurred because of a fit of uncontrollable rage on the part of Mr. Red, the reason for the rage being largely unknown. Such is the only plausible explanation of what occurred based upon the record established at trial.

Mr. Red's actions violated 11 U.S.C. § 523(a)(6) because there was an objective substantial certainty of harm from the actions which he knowingly and intentionally and willingly took.

The claims of Nilda Roos and Willa Baum for wrongful death of Noah Baum and David Roos will not be discharged.

## 727 CAUSES OF ACTION

Although the Court has great suspicion that Mr. Red moved to Austin and filed the bankruptcy for the sole purpose of doing so in Texas and not California and then moved right back to California – never having established a permanent residence here, the Court declines at this

time to make such a ruling because of its ruling that the plaintiffs' claims are not discharged under 11 U.S.C. § 523(a)(6).

An Order of even date will be entered herewith.

# # #

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

DIVISION 7

July 26, 2005

David S. Ettinger
Horvitz & Levy
15760 Ventura Blvd 18th Floor
Encino, CA 91436-3000

Nilda Roos, et al.
v.
Eric Red

B173506
Los Angeles County No. SC061977
Los Angeles County No. SC066841

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

Court of Appeal, Second Appellate District,
Division Seven No. B 173506
**S136099**

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

NILDA ROOS et al., Plaintiffs and Respondents,

v.

ERIC RED, Defendant and Appellant.

(Filed Sep. 21, 2005)

Petition for review DENIED.

George, C.J., was absent and did not participate.

CHIN
Acting Chief Justice